IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal Nos.1078 to 1080 of 1994

Murugesa Gounder ... Appellant in S.A.No.1078,1079, 1080/94

Vs.

1. Narayanasamy
2. Govindaraj
3. Arumugam
4. Ramasamy
5. Pavanambal
6. Rasiammal
7. Senbagam ... Respondents in S.A.No.1078,1079, 1080/94

PRAYER IN S.A.No.1078 of 1994: Second Appeal against the Judgment and decree dated 31.10.1991 made in A.S.No.32 of 1988 on the file of the Subordinate Judge, Court of Tiruvannamalai in confirming the judgement and decree dated 24.02.1988 made in O.S.No.1380 of 1980 on the file of the Court of the District Munsif of Tiruvannamalai.

PRAYER IN S.A.No.1079 of 1994: Second Appeal against the Judgment and decree 31.10.1991 made in A.S.No.46 of 1988 on the file of the Court of Subordinate Judge of Tiruvannamalai in confirming the judgement and decree dated 24.02.1988 made in O.S.No.1381 of 1980 on the file of the District Munsif of Tiruvannamalai.

PRAYER IN S.A.No.1080 of 1994: Second Appeal against the Judgment and decree dated 31.10.1991 made in A.S.No.23 of 1989 on the file of the Subordinate Judge of Tiruvannamalai in confirming the Judgement and decree dated 24.02.1988 made in O.S.No.1388 of 1980 on the file of the District Munsif of Tiruvannamalai.

WEB COPY

For Appellant : Mr.P.Mani
Mr.N.Srinivasan
For Respondent : No appearance

COMMON JUDGEMENT

The unsuccessful defendant in O.S.Nos.1380 of 1980, 1381 of 1980 and 1388 of 1980 in both the Courts below is the appellant in all these three appeals, namely, Second Appeal Nos.1078, 1079 & 1080 of 1994. The

https://hcservices.ecourts.gov.in/hcservices/

original plaintiff in O.S.No.1380 of 1980 and 1381 of 1980 Munusamy Gounder whose legal representatives are the respondents herein, has filed the suit in O.S.No.1380 of 1980 against the defendant/appellant for a declaration in respect of the ownership of A Schedule property comprised in Survey No.106/1A to the total extent of 1.12 acres and also for possession in respect of B Schedule property comprised of 22 cents which is formed part of A Schedule property stated to have been encroached by the defendant/appellant. The said suit was filed by the said Munusamy Gounder, who is no one else than the paternal-uncle of the appellant/defendant, on the ground that he purchased the suit property under a sale deed Ex.A.1 dated 24.02.1928.

2. Likewise he has also filed O.S.No.1381 of 1980 for the same relief of declaration and injunction in respect of a 1.18 acres of land out of the total extent of 1.54 acres comprised in Survey No.87/6 stating that the defendant/appellant has encroached 47 cents of land.

3. On the other hand, the defendant/appellant filed O.S.No.1388 of 1980 for a declaration and possession against the said Munusamy Gounder, plaintiff in the other suit, in respect of 47 cents of land comprised in Survey No.87/6 and 33½ cents of land comprised in Survey No.106/1A. Both the Trial Court as well as the First Appellate Court on elaborate trial have decreed the suits filed by the Munusamy Gounder and dismissed the suit filed by the defendant/appellant as against which the present appeals are filed.

4. While it was the case of the plaintiff Munusamy Gounder in O.S.No.1380 of 1980 that in respect of Survey No.106/1A he is the absolute owner of the entire A Schedule property measuring 1.12 acres claiming to have purchased the same under Ex.A.1 sale deed dated 24.02.1928 and therefore, the conduct of the appellant/defendant in encroaching 22 cents described in B Schedule out of the said 1.12 acres of A Schedule amounts to trespass and therefore, he was entitled for possession. In respect of Survey No.87/6 it was the case of the plaintiff that the total extent of 1.54 acres in the said Survey number is a joint family property originally belonged to the plaintiff's father Pachaiyappa Gounder and thereafter there was a partition between the brothers and the plaintiff. The said Pachaiyappa Gounder died leaving behind him, the plaintiff in the said suit Munusamy Gounder and the father of the defendant/appellant Kista Gounder and thereafter there was a partition between the brothers, namely, the plaintiff and the said Kista Gounder and the properties in the entire Survey No.87/6 was divided into 9 parts out which the G portion was accepted to be a common passage and out of the remaining 1.48 acres of land, 74 cents stated as ACF was taken by the plaintiff Munusamy Gounder and the other 74 cents of land stated as BDEH was given to the share of Kista Gounder. The said Kista Gounder who left out of the country returned in 1931 and agreed to sell the said 74 cents allotted to him under Survey No.87/6 under the above said partition to the plaintiff Munusamy Gounder under a sale deed dated 18.09.1946. However the sale could not be completed and there was a panchayat in which it was agreed

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

that the said Kista Gounder and his son the appellant/defendant should sell 44 cents of land in Survey No.87/6 to the plaintiff for Rs.77/- and the balance amount should be returned by the plaintiff and accordingly the plaintiff has returned the balance amount of Rs.123/- and the said Kista Gounder and his son the defendant/appellant by oral sale have given the 44 cents of land to the said Munusamy Gounder and thereafter he has been in ejoyment of the said property for a long time and has also obtained title by adverse possession. However, when the defendant has unauthorizedely attempted to encroach upon the property belonging to the plaintiff in Survey No.106/1A, the present suit in O.S.No.1381 of 1980 was filed by the plaintiff for a declaration and also injunction.

5. It is the case of the defendant/appellant in the written statement that in respect of Survey No.106/1A, subject matter of suit in O.S.No.1380 of 1980 there was a family partition 50 years ago by which 55½ cents was given to plaintiff's family and 55½ cents was given to the defendants. While so the plaintiff in O.S.No.1380 of 1980 has encroached upon the said allotted lands to the defendants to the extent of 33½ cents in Survey No.106/1A for which the defendant/appellant has filed O.S.No.1388 of 19980 for declaration and recovery of possession.

6. Likewise it was his case in O.S.No.1381 of 1980 in the written statement that the plaintiff has encroached upon 47 cents in Survey No.87/6 after the partition and therefore, he has filed the suit for recovery of possession against the plaintiff in O.S.No.1388 of 1980. As I have stated earlier the suit filed by the plaintiff in O.S.No.1380, 1381 of 1980 was decreed by both the courts below while the suit filed by the defendant/appellant in O.S.No.1388 of 1980 was dismissed by both the courts below against which the above three appeals have been filed by the defendant Murugesa Gounder.

7. At the time of admission of the Second Appeal the following substantial questions of law was framed:

Question of Law in S.A.No.1078 of 1994

a) Whether the plaintiff is entitled to the suit property by prescription when admittedly the plaintiff and the defendant are co-sharers and when in law there cannot be any adverse possession against co-owner?

b) Whether the judgement and decree of the lower appellate court are sustainable in law when the lower appellate court has failed to frame necessary points for determination as required under Order 41, Rule 31 of C.P.C.?

c) Whether the courts below erred in law and misdirected themselves in holding that the plaintiff has perfected his right over the entire suit property by adverse possession when admittedly the defendant and his father have been in possession and enjoyment of 'B' schedule property for more than the statutory period by personally cultivating the same and paying

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

kist?
d) Whether in law the judgement and decree of the courts below sustainable when they have failed to appreciate the oral and documentary evidence record in their proper perspective?
e) Whether in law the defendant is entitled to castern 55 1/2 cents in the suit property by adverse possession when he and his father have been in open, continuous and uninterrupted possession and enjoyment of the said portion of the suit property for more than the statutory period eversince the allotment of the same in the family partition?

Question of Law in S.A.No.1079 of 1994
a) Whether the courts below erred in law and misdirected themselves in holding that the plaintiff is entitled to the suit property by adverse possession when the plaintiff claims to the property as if he has purchased the same orally as in law one cannot claim absolute right as well as right by prescription simultaneously?
b) Whether the judgement and decree of the lower appellate court are sustainable in law when the lower appellate court has failed to frame necessary points for determination as required under Order 41, Rule 31 of Code of Civil Procedure?
c) Whether the courts below erred in law and misdirected themselves in holding that the plaintiff has perfected his title over the entire suit property by adverse possession when admittedly the defendant and his father have been in possession and enjoyment of 77 cents on the Western side in S.No.87/6 for more than the statutory period in their own right by personally cultivating the same and paying kist?
d) Whether in law the judgement and decree of the courts below are sustainable when they have failed to appreciate the oral and documentary evidence on record in their proper perspective?

"Question of Law in S.A.No.1080 of 1994
a) Whether the courts below erred in law and misdirected themselves in holding that the defendant is entitled to the lands in S.No.87/6 by adverse possession when the plaintiff put forward his claim as if he has purchased the same orally as in law one cannot claim absolute right as well as right by prescription simultaneously?
b) Whether the defendant is entitled to the lands in S.No.106/1 by prescription when admittedly the plaintiff and the defendant are co-sharers?
c) Whether the courts below erred in law and misdirected themselves in holding that the defendant has perfected his title over the entire suit properties by adverse possession?
d) Whether the judgement and decree of the lower appellate court are sustainable in law when the lower appellate court has failed to frame necessary points for determination as required under

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

Order 41, rule 31 C.P.C.?

e) Whether in law the judgement and decree of the courts below are sustainable when they have failed to appreciate the oral and documentary evidence on record in their proper perspective?"

8. In respect of Survey No.106/1A subject matter of suit in O.S.No.1380 of 1980 both the courts below have found that the plaintiff Munusamy Gounder has purchased the said property to the extent of 1.13 acres of land under Ex.A.1 sale deed dated 24.02.1928, after the family partition which took place in 1926 and the plaintiff's property to the said extent of 1.13 acre is on the Northern side of the total extent of 2.24 acres of land while the Southern side to the extent of 1.13 acres of land has been purchased by Lakshmana Gounder on the same date, namely, 24.02.1928 marked as Ex.A.33 and from the date of the said purchase by the plaintiff under Ex.A.1 he has been in absolute possession of the property by paying kist and everything in respect of the land and holding that the plaintiff has purchased the said property from out of his own income and also finding categorically that the defendant has not produced any document to show otherwise, that the plaintiff's witnesses have stated about the continuous possession of the plaintiff in Survey No.106/1A and both the courts have come to the conclusion that the plaintiff is entitled for the decree of declaration and possession in respect of 22 cents in Survey No.106/1A which was mentioned as A Schedule and the encroachment of 22 cents mentioned in B Schedule in O.S.No.1380 of 1980.

9. Likewise in respect of Survey No.87/6, subject matter of suit in O.S.No.1381 of 1980 on appreciation of evidence both the courts below have found that the father of the defendant Kista Gounder has given 44 cents of land by oral sale to the plaintiff and from the said date on wards the plaintiff has been paying the kist and everything and that was related to Ex.A.31 sale deed executed by the defendant's father in favour of the plaintiff and on that basis both the courts have come to the conclusion that in Survey No.87/6 the plaintiff is entitled for 1.18 acres and decreed the said suit in O.S.No.1381 of 1980 and consequently dismissing the suit filed by the defendant in O.S.No.1388 of 1980 in respect of the said two items of properties.

10. In these appeals it is seen that the respondents 1,3 and 5 have been served and there is no appearance and in respect of respondents 6 and 7 the appeal was already dismissed by the order dated 28.09.2007. In respect of respondents 2 and 4 even though it is stated that they have died no steps taken and therefore, the appeal is dismissed as against R2 and R4.

11. A perusal of the First Appellate Court judgement would show that in fact the first Appellate Courts has framed the points for consideration and discussed the same in detail and therefore, no question of violation of Order 41 and Rule 31 of Code of Civil Procedure. On the factual position, both the courts below have found that in respect of Survey

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

No.87/6 the defendant's father has given 44 cents by oral sale in favour of the plaintiff and thereafter the plaintiff has been enjoying for more than statutory period and perfected a title by adverse possession.

12. In view of the above said factual position there is no substantial question of law involved and therefore, the Second Appeals fail and the same are dismissed. No Costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nbj

To
1. The Subordinate Judge, Tiruvannamalai.

2. The District Munsif, Tiruvannamalai.

3. The Record Keeper, VR Section, High Court, Madras.

+ 1 CC To Mr. P.Mani, Advocate SR NO.21418

S.A.No.1078 of 1994

vc[co]
Gp/28.5.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/